

**Marina Associates, d/b/a Harrah's Marina Hotel and Casino and Casino Police and Security Officers, Local 2, affiliated with Federation of Special Police and Law Enforcement Officers, Petitioner. Case 4-RC-14837**

26 August 1983

### DECISION ON REVIEW

BY MEMBERS JENKINS, ZIMMERMAN,  
HUNTER, AND DENNIS

On 23 November 1982 the Regional Director for Region 4 issued a Decision and Order dismissing a petition filed for a unit of the Employer's guard employees.<sup>1</sup> The Regional Director concluded, *inter alia*, that the Petitioner, Casino Police and Security Officers, Local 2, and its parent organization, the Federation of Special Police and Law Enforcement Officers (hereinafter the Federation), are not organizations dedicated to the interests of employees as bona fide collective-bargaining representatives; that they are not organizations in which employees participate to any significant extent in the governance and administration thereof; and that they are not labor organizations within the meaning of Section 2(5) of the Act. Thereafter, in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed a timely request for review of the Regional Director's decision.

The Petitioner contends that the decision is contrary to established Board precedent governing the definition of, and requirements for, recognition of a labor organization, and that the decision is erroneous and prejudicial as it is substantially based upon findings of criminal activity on the part of individuals who are officers of the Federation, and upon findings of noncompliance with subpoenas issued by the Employer seeking testimony and documents relating to the Petitioner and to the Federation.

On 12 January 1983 the National Labor Relations Board, by telegraphic order, granted the Petitioner's request for review of the issue of labor organization status. Thereafter, the Employer filed a brief on review.

The Board has considered the entire record in this case and the attached Regional Director's Decision and Order in light of the request for review and briefs. The Board has decided to affirm the decision of the Regional Director, as it agrees with his conclusion that, on the record, neither the Petitioner nor its parent, the Federation, has demonstrated that it is a labor organization within the

meaning of Section 2(5) of the Act.<sup>2</sup> Accordingly, the Board affirms the order of the Regional Director dismissing the instant petition.

<sup>2</sup> Although the Board adopts the Regional Director's conclusion, it does not find it necessary to rely upon his ancillary finding that "[t]he record is practically devoid of evidence that the Federation observes any of the most fundamental practices of democratic governance." Whether a union need be democratic to constitute a labor organization under the statute is a proposition we need not address.

Nor do we find it necessary to adopt the rationale of the Regional Director that the officers of these organizations do not function with the "single-minded purpose of protecting and advancing the interests of employees who have selected [it] as their bargaining agent." While that standard has been enunciated as a test in "competitive conflict of interest" cases such as *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1559 (1954), Sec. 2(5) of the Act requires only that the alleged labor organization exist "in whole or in part" for the purpose expressed in that section. As found by the Regional Director, the Petitioner and the Federation have failed to establish that they exist, either in whole or in part, for the purposes set forth in the statute.

### APPENDIX

#### DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record<sup>1</sup> in this case, the Regional Director finds:

<sup>1</sup> On the last day of hearing in this matter, exhibit numbers were reserved for Employer's Exhibit 45 (excerpts from testimony of Vito Antuofermo in the trial of *United States v. Daniel Cunningham, Herman Jaffe and Salvatore Ponte*, Eastern District of New York (CR81-00480), and Employer's Exhibit 46 (a copy of the New Jersey Casino Control Act, N.J.S.A. 5:12-1 *et seq.*), copies of which were to be supplied to the Hearing Officer and to the parties at a later date. At that time, the Hearing Officer admitted Exhibit 45 into evidence. Although there was no objection to receiving Exhibit 46 into evidence, it was not admitted due to an oversight by the Hearing Officer. After the close of the hearing, the Employer submitted copies of both exhibits to the Hearing Officer and supplied them to the Petitioner and to the Intervenor. As there was no objection to the receipt of Employer's Exhibit 46, I shall admit it into evidence.

The Employer also filed a post hearing Motion to Reopen Record and to Admit into Evidence Employer's Exhibit 47. This exhibit, which is a letter from the prosecuting attorney of the Department of Justice to the District Court Judge who presided over the criminal prosecution of Daniel Cunningham, Herman Jaffe and Salvatore Ponte, summarizes the scope of the criminal conviction of Cunningham and Jaffe and describes Cunningham's alleged underworld associations and alleged participation in crimes other than those which were the subject of the indictment involved. It also includes extensive argument and a recommendation in favor of imposition of a substantial sentence. Many of the assertions in the letter constitute hearsay, and refer to pages in the transcript of the criminal trial which are not part of the record in the instant representation case. Nevertheless, no objection has been filed to the Employer's Motion. I shall, in the absence of objections, grant the motion and reopen the record for the limited purpose of admitting Employer's Exhibit 47 into evidence.

I have taken official notice of the records in prior cases involving the Petitioner currently pending before the Board on review: *Greate Bay Hotel & Casino, Inc.*, Case 4-RC-14377; *GNAC, Inc., d/b/a Golden Nugget Hotel and Casino*, Case 4-RC-14522; and *Resorts International, Inc.*, Case 4-RC-14588. In those cases, Decisions and Directions of Elec-

*Continued*

<sup>1</sup> National Police Security Officers Union, Local 9, affiliated with National Police Security Officers, intervened and participated in this proceeding.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer<sup>2</sup> is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

The Employer moved to dismiss the petition on the ground, *inter alia*, that Petitioner is a criminal enterprise operated for the sole purpose of enriching Daniel Cunningham and that, therefore, it is not a labor organization within the meaning of Section 2(5) of the Act.<sup>3</sup> The record discloses that, on June 16, 1982, in the above cited criminal proceeding, Cunningham, Jaffe and Ponte were found guilty of conducting the affairs of Federation, Allied International Union of Security Guards and Special Police (Allied Union) and Allied Security Health and Welfare Fund (Allied Fund) through a pattern of racketeering activity since 1975. Cunningham and Jaffe were convicted of converting to their own use approxi-

tions were issued by the undersigned finding, *inter alia*, that the Petitioner and the Federation of Special Police and Law Enforcement Officers (Federation) were labor organizations within the meaning of Section 2(5) of the Act and that the Petitioner and Federation were not disqualified under Section 9(b)(3) from being certified as the representative of a unit of guards.

<sup>2</sup> The name of the Employer appears as amended at the hearing.

<sup>3</sup> The Employer further contends that the Petitioner is affiliated directly or indirectly with a labor organization which admits to membership employees other than guards, which precludes the Board from certifying the Petitioner under Section 9(b)(3) of the Act. The Employer bases its position on the fact that the Petitioner utilizes the services of a volunteer organizer in Las Vegas who is a non-guard union. I find such evidence is insufficient to establish the proscribed affiliation which would disqualify the Petitioner under Section 9(b)(3) of the Act.

The Employer also contends that the petition should be dismissed because, under the provisions of the New Jersey Casino Control Act, NJSA 5.12-1, *et seq.*, the Petitioner is precluded from legally collecting dues or administering pension or welfare funds by virtue of the criminal convictions of its officers Cunningham and Jaffe. There is no evidence in the record before me as to whether the Petitioner has yet filed a registration statement with the New Jersey Casino Control Commission, pursuant to the requirements of the Casino Control Act. Thus, without deciding whether the Petitioner's failure to register with the New Jersey Casino Control Commission or the Commission's refusal to approve the Petitioner's application would constitute grounds for dismissing the petition, such an argument is premature in the instant case.

The Employer argues that evidence of a conflict of interest exists which prevents the Petitioner from fairly representing employees. During the criminal trial, Cunningham's attorney stated that Cunningham was involved in a real estate venture with the owner of a company which is a party to a collective-bargaining agreement with the Allied Union. The Employer contends that this creates a conflict of interest which may preclude protection of the interests of the employees of that company. However, the record evidence is insufficient to establish that Cunningham had a disqualifying conflict of interest with respect to that company. See, *Bridgeport Jai Alai, Inc.*, 227 NLRB 1519; *David Buttrick Company*, 167 NLRB 438. The Employer also argues that a conflict of interest exists based on the fact that Kathleen Tomasso, the wife of Anthony Tomasso who is the Vice President of the Petitioner and the Federation, is the President of Intelligence Services, Inc., a corporation which provides guard services. There is no evidence in the record concerning the business of this corporation, or establishing that it has bargaining relationship with any of Cunningham's organizations. Therefore, I find insufficient evidence of any disqualifying conflict of interest based on the involvement of Kathleen Tomasso in Intelligence Services, Inc.

mately \$63,000 of the funds of the above-named organizations, including approximately \$39,000 in salary and expense payments to Cunningham's wife for purposes found to be unrelated to Union business. Cunningham was convicted of committing arson at the offices of Federation, Allied Union and Allied Fund, of attempting to bribe two agents of the Department of Labor engaged in an investigation of the above-named organizations, and of attempting to bribe a witness in order to obstruct the investigation. Jaffe was also convicted of staging and falsely reporting to the police the theft of an automobile in order to defraud an auto leasing company.

According to the criminal trial testimony of Peter Gamaldi, who had business contacts with Cunningham since 1973, Cunningham told him in 1974 that there was "quite a bit of money to be made in the labor business," and that Cunningham could acquire the Allied Union for \$90,000. William Wachholder, Cunningham's father-in-law, testified at the criminal trial that Cunningham told him that he was going to establish a local of the Federation for power plant security employees (Power Plant Police and Security Officers, Local 1), and he promised to make Wachholder president. Wachholder was also appointed by Cunningham as Vice President of the Federation and, without Wachholder's knowledge, as Secretary-Treasurer of the Petitioner. Wachholder testified that he never attended any executive board meetings of the Federation, the Petitioner or Local 1, and never performed any functions as an officer of these organizations. However, he signed papers when requested to do so by Cunningham. At Cunningham's request, he signed an undated letter of resignation.

Frank Salvatto, a former member of the Executive Board of the Petitioner and the Federation, testified at the criminal trial that he was instructed by Cunningham to give a "special contract . . . as good a contract as we possibly could" to Nasco Security, one of whose owners had suggested that it could help Cunningham bribe an agent of the Department of Labor to influence its investigation of Cunningham. Cunningham told Salvatto that, if the scheme was successful, Federation would be voluntarily recognized by Nasco Security, and "give [the employer] whatever is necessary" in a collective-bargaining agreement.

The Employer takes the position, based on the foregoing evidence, that the true purpose of these organizations is to advance the financial interests of Cunningham and his associates. Further, the Employer argues that Cunningham's willingness to bribe a federal agent and to give the employer who agreed to set up a meeting with the agent a sweetheart contract shows that Cunningham was prepared to sell out and sacrifice the interests of the employees Federation was supposed to represent in collective bargaining in exchange for assistance in evading criminal prosecution.

The Employer also moved to dismiss the petition based on "Petitioner's contumacious failure to make available to the Board and to the parties necessary facts which are in the possession or control of the Petitioner," relying on the Board's decisions in *McDonald's of Canoga Park Calif., Inc.*, 162 NLRB 367, and *Douglas Oil Com-*

pany, 197 NLRB 308. Thus, it contends that, as a result of the deficient, shifting and contradictory testimony of the officials of the Petitioner and the Federation and their failure to produce subpoenaed documents and records relevant to the issue of their labor organization status, the record creates substantial doubt that the Petitioner is a labor organization within the meaning of the Act, a doubt which the Petitioner has failed and refused to resolve. The record discloses the following with respect to this issue:

#### *Non-Compliance With Subpoenas*

The Employer subpoenaed Federation President Daniel Cunningham, Federation Trustee/Petitioner's Secretary-Treasurer Herman Jaffe, and former Federation representative Vincent Ricciardo to testify at the hearing commencing September 22, 1981. The Employer also served subpoenas duces tecum on Cunningham, Petitioner's President Anthony Miceli, the custodian of records of the Allied Fund, and on the custodian of records of the Allied Union, requiring them to produce various documents at the hearing held on September 22. Of the above, only Cunningham appeared on September 22, 1981, and he did not produce any of the documents sought by the subpoena.

On September 22, 1981, the Employer filed Motions requesting that the Board seek Court enforcement of the subpoenas. Subsequently an Application For Order Requiring Obedience to Subpoenas Ad Testificandum and Duces Tecum was filed in United States District Court for the Eastern District of Pennsylvania in Misc. No. 81-315. Following a hearing before Judge Alfred L. Luongo, on December 3 and 21, 1981, the Court issued an Order and an Amended Order, respectively, directing the subpoenaed persons to appear before the Hearing Officer at a time and place fixed by the Hearing Officer, and to give testimony and produce documents in compliance with the subpoenas.

With the exception of Petitioner's President Miceli, who did not appear at the hearing until March 3, after failing to appear at the hearing on September 22 and 23, October 14, February 23 and March 2, and Federation President Cunningham, who appeared only on September 22 and did not produce any subpoenaed documents, none of the subpoenaed persons appeared at any time during the course of the hearing. The only other officer of the Petitioner or the Federation to testify at the hearing was Anthony Tomasso, Vice President of the Petitioner and the Federation, who was called by the Petitioner and testified on March 2 and March 3, 1982.<sup>4</sup>

#### *Alleged Theft of Subpoenaed Documents*

The Petitioner claims that it gathered most of the subpoenaed documents, but that they were stolen from Tomasso's car shortly before they were to be produced at

the hearing. Tomasso testified that he put two cardboard boxes containing documents and weighing about 25-30 pounds each into the trunk of the automobile he used which was leased by the Federation from a Long Island, New York dealer. He did not know exactly what documents were in the boxes.<sup>5</sup> On Sunday, February 7, 1982, he drove the car, which had been having overheating problems and needed a tune-up, from his residence in New York to New Haven, Connecticut.<sup>6</sup> Pursuant to the arrangement Tomasso made with a mechanic, who had previously serviced another car for Tomasso, he left the car locked, with the keys hidden inside under the floor mat, in a parking lot across the street from the mechanic's shop. The mechanic told him to call on Tuesday, February 9. On the morning of February 9, he called the mechanic and was told that the car was missing. Tomasso reported the missing car to the New Haven police. Thereafter, the police received an anonymous tip and located the car in Warwick, Rhode Island on February 12, 1982. The ignition and trunk keys were under the floor mat, where they had been hidden by Tomasso, but the boxes and a briefcase were missing from the trunk. The police report stated that the ignition did not appear to have been tampered with. Tomasso testified that he observed that the trunk closing area was scratched, dented and pried up. However, photographs in evidence and police reports indicate no damage to the trunk. Tomasso was not sure whether he reported to the police that the documents were missing, and the New Haven police report documenting the recovery of the car does not refer to any such theft.

On February 23, 1982, the Hearing Officer spoke by telephone to Tomasso when the Petitioner failed to appear at the hearing scheduled for that date, due to the reported illness of its counsel. Tomasso stated that the Petitioner was unwilling to produce the subpoenaed documents in the absence of its counsel. Tomasso made no mention at that time of the alleged theft of the subpoenaed documents which had occurred two weeks earlier.

Later in the hearing, the Petitioner's counsel stated that, in view of the theft of the car, he would make an effort to obtain copies of the subpoenaed documents from Petitioner's accountant and other sources. On the last day of hearing, he represented, without further detail, that Tomasso had obtained copies of some subpoenaed documents but that Tomasso was unable to attend the hearing. He was advised by the Hearing Officer that he had the right to file a motion to reopen the record in order to present such evidence. In addition, the Hearing Officer stated that the Justice Department attorney who had handled the criminal proceeding advised him by telephone that the Federation was free at all times to photocopy any of its records which it had produced pur-

<sup>4</sup> On May 29, 1982, an investigator employed by the Employer attempted to serve a subpoena duces tecum on Tomasso. The investigator did not find Tomasso at the Petitioner's office, but spoke with Tomasso by telephone. After the investigator identified himself and stated that he wanted to talk to him "about the NLRB hearing which is scheduled for next Wednesday in Philadelphia," Tomasso replied, "If that's about service of a subpoena, I'm not going to accept it; I don't care what you do with it. I want you out of my office right away, you better leave."

<sup>5</sup> The Petitioner's attorney stated that, with minor exceptions, all of the original documents subpoenaed from the Petitioner, the Federation, the Allied Union and the Allied Fund were in the boxes. He and Tomasso had an appointment for February 6, 1982, to examine the documents, which was rescheduled to February 8, and then rescheduled to February 9.

<sup>6</sup> Tomasso's wife also went to New Haven on February 7, but drove another car. Tomasso and his wife visited their daughter who lived in New Haven.

suant to subpoena in that proceeding, and that the Federation had "already photocopied a substantial amount of records, including checks and minutes." Notwithstanding the Hearing Officer's advice, no motion to reopen the record was made nor was there any attempt to produce copies of the allegedly stolen subpoenaed documents.

#### *President Miceli's Testimony*

Anthony Miceli testified on March 3, 1982. Even though he was aware that the Employer had subpoenaed him and that the District Court had enforced the subpoena, he failed to appear at the hearing on September 22 and 23, October 14, February 23 or March 2 because he was "probably busy." Miceli testified that the Petitioner is funded entirely by loans of \$55,000 from the Federation and has no members. He did not know the term of office of any of the Petitioner's officers, including himself, whether the Petitioner's Constitution and By-laws had ever been amended, or how many meetings of the Petitioner's officers had been held. He did not know the name of the Petitioner's accountant or what records the accountant maintained for the Petitioner, whether the Petitioner kept Federal Income Tax records with respect to its employees, or the name of Petitioner's landlord.

Introduced into evidence by the Employer were minutes prepared by Miceli of a meeting held on May 1, 1980, at the Federation's offices, for the purpose of establishing the Petitioner. According to the minutes, at the meeting were Miceli, Frank Ponte, Williams Wachholder, Eugene Brown, Frank Salvatto, Cunningham and Federation's counsel Mitchell Goldblatt. According to the minutes, Miceli was elected President, Ponte was elected Vice-President, Wachholder was elected Secretary-Treasurer, Brown and Salvatto were elected Board members. Despite the fact that the minutes do not show that Herman Jaffe was attendance at the meeting, Miceli testified that Jaffe was also present at the meeting and was elected a trustee. In addition, contrary to the minutes, William Wachholder, Cunningham's father-in-law, testified in the criminal proceeding referred to above that, in spite of his appointment by Cunningham as Federal Vice-President, he never attended any meetings of the Federation or the Petitioner and did not know until some time after May 1, 1980, that he was an officer of the Petitioner.

Miceli testified that the Executive Committee of the Federation later appointed Anthony Tomasso Vice-President, whereas Tomasso testified that he believed that Miceli appointed him. Miceli further testified that, prior to the formation of the Petitioner, he was an officer of Local 1. However, the minutes of the meetings at which Petitioner and Local 1 were established show that both organizations were founded only minutes apart.

Miceli also testified that, since 1979, he has not only been the Petitioner's President, but also a paid representative of the Federation, the Allied Union and the Allied Fund. He could not remember how much he was paid by the Allied Fund, did not know who administers the Fund, who are its trustees, where its records are kept or which insurance company it uses. He testified that he did not report directly to the Allied Fund because it and the Federation were "all one," and that he reported to To-

masso in the latter's capacity as the Federation's vice-president.

With respect to the Federation, Miceli testified that he thought there was an election of officers in October 1979. The Federation's report to the Department of Labor for 1979 to 1980 states that the next election was scheduled for June 1981. Miceli did not know whether the 1981 election took place, and testified that he has never participated in a Federation election.

According to Miceli, at the beginning of February 1982 he gathered the Petitioner's records for production in this proceeding. He testified that he put all of the records involved into a box which he brought to the Federation's office. He did not have copies. This was one of the boxes which were allegedly stolen from Tomasso's car. Miceli was unconcerned about the loss,<sup>7</sup> and he testified on March 3, 1982, that he had done nothing to obtain copies or substitutes from other sources.

#### *Vice-President Tomasso's Testimony*

Tomasso testified that the Executive Board of the Federation appointed him as vice president of the Federation, and that officers can be selected by appointment or election. He testified that, although the Federation Constitution only requires that elections be held every five years, there were elections held in 1979 and 1981. He did not know how the salaries of Federation officers are determined, and believed that, if he wanted a salary increase, he only had to ask the Executive Board. He did not know Cunningham's salary. Tomasso was confused about whether the Federation officers comprised the Executive Committee or the Executive Board or whether he was a member of either body. He did not know whether the Federation Constitution required meetings of the Executive Board.

On direct examination by counsel for the Employer, Tomasso estimated, based on what he had "been reading about in the papers lately," that the number of Federation members ranged from eight to ten thousand. On recross examination by Petitioner's counsel, he changed his testimony to four to five thousand members. Finally, on further redirect examination by the Employer's counsel, he testified that the figure was about fifteen hundred. Tomasso is also an officer of the Allied Union and an employee of the Allied Fund. He first testified that there were one thousand Allied Union members and then lowered the figure to five hundred.

Tomasso initially testified that the Federation had monthly membership meetings, the most recent of which was conducted on February 20, 1982. He later testified that the February 20 meeting was not a general membership meeting and that he was not aware of any general membership meetings. He testified that he did not have

<sup>7</sup> When questioned about when he found out that the boxes had been stolen, Miceli testified, "Oh, a couple of days after the car was stolen. I really don't know, you know. Tony [Tomasso] told me the car was stolen. I said great. . . . It had nothing to do with me, why should I know? If it had something to do with me, other than my, supposedly you know, the boxes were put in the trunk, other than that, it had nothing to do with me. I had nothing to do with it. I don't care if the car got stolen or not because it ain't my car. . . . But you're asking me for something that I don't care about, you understand?"

access to any Federation documents recording dues receipts and did not know who would, nor did he know whether the Federation's accountant had records reporting wages paid to Federation employees.

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In *Alto Plastics Manufacturing Corp.*, 136 NLRB 850, the labor organization status of the Petitioner therein was challenged on the ground that its president and "consultant" was found by the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee) to have "seriously misused his position, defrauded the union's membership, and played a key role in the infiltration of gangsters and racketeers into that union." However, the record also established that the union had bylaws adopted by the Union's general membership which provided for the secret ballot election of officers, stewards and trustees, the right to vote on all matters of importance and general and plant membership meetings. The record also showed that general membership and plant membership meetings were, in fact, held, that an election was conducted within the year prior to the hearing and that the Union had collective-bargaining agreements with several employers and processed employee grievances. The Board held that, so long as an organization satisfied the definitional requirements of Section 2(5) of the Act, i.e., that it is an organization in which employees participate and that it exists for the purpose, in whole or in part, of dealing with employers concerning wages, hours and other terms and conditions of employment, the Board would find it to be a labor organization. The Board went on to say, "If an organization fulfills these two requirements, the fact that . . . certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot affect the conclusion that the organization is a labor organization within the meaning of the Act."

In *McDonald's of Canoga Park Calif. Inc.*, 162 NLRB 367, and *Douglas Oil Company*, 197 NLRB 308, the Board reaffirmed the principle stated in *Bausch & Lomb Optical Company*, 108 NLRB 1555, that in collective bargaining, "the Union 'must be there with the single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent, and there must be no ulterior purpose.'" *McDonald's*, *supra* at 368. In *McDonald's* and *Douglas Oil*, the Board dismissed the petitions, finding that, by reason of their lack of candor regarding control and affairs and their failure to present meaningful evidence on these matters, the petitioners had precluded the Board from resolving "a substantial doubt as to whether [the organization] does act or is competent to act as an employee bargaining representative in accordance with that standard." *McDonald's*, at 368. In *Douglas Oil*, the Board further concluded that "the Petitioner's conduct at the second hearing, including testimony which we find to be totally lacking in candor and, in many instances, totally incredible compels us to conclude that the Petitioner is in reali-

ty something other than a collective-bargaining representative." *Douglas Oil*, at 311.

What emerges from this record, and particularly the evidence with respect to the criminal proceeding, is a picture of an organization, the Federation, owned and operated by Cunningham and his associates as their personal business and for their personal profit. The record is practically devoid of evidence that the Federation observes any of the most fundamental practices of democratic governance. Thus, there is no reliable evidence in the record that the Federation has ever had a general membership meeting, has ever had an election of officers, or has ever countenanced employee participation in its affairs, except that there was some testimony by Miceli that employees serve on negotiating committees, vote on ratification of contracts and elect shop stewards. In addition, the lack of candor by officials of the Petitioner and the Federation regarding the organization, operation and affairs of these organizations, the failure of representatives of the Petitioner and the Federation to present evidence worthy of belief in response to basic questions concerning the affairs of these organizations relevant to the issue of their labor organization status, only serves to demonstrate the extent to which these organizations and their representatives were prepared to go to obscure and block the truth, and certainly gives rise to a substantial doubt whether it is the Federation's and the Petitioner's purpose to serve and protect the interests of the employees they may come to represent for collective bargaining.

The testimony of Anthony Miceli and Anthony Tomasso was extremely vague and inconsistent. They displayed unbelievable ignorance of matters which could reasonably be expected to be within special knowledge and control. They were uncertain as to such basic information as their terms of office, the organizational structure of the Federation, the size of the membership of the Federation, how officers' salaries are determined, and whether there were any general membership meetings. Miceli displayed almost total ignorance of the Allied Fund, of which he is a representative, including a lack of knowledge as to who administered the Fund and how much he was paid. Tomasso testified that there were Federation elections in 1979 and 1981, although he also testified that the Federation Constitution only provides for elections every 5 years. Miceli did not know whether there had been an election in 1981. Miceli's testimony placing Herman Jaffe at the May 1, 1980, meeting establishing the Petitioner differs from the minutes he prepared, and his testimony placing William Wachholder at that meeting contradicts Wachholder's denial that he attended such a meeting. Further, Tomasso testified, contrary to Miceli, that the latter appointed him Vice-President of the Petitioner.<sup>9</sup>

<sup>9</sup> At the instant hearing, Miceli testified concerning the Petitioner's "attempted disaffiliation" from the Federation in February 1981. On the first day of hearing in *Resorts International, Inc.*, Case No. 4-RC-14588, Petitioner's witnesses described in detail the steps taken by the Petitioner to disaffiliate from the Federation. On the second day of hearing in that case, Miceli testified that on March 28, 1981, the Petitioner reaffiliated with the Federation, and the Petitioner then stipulated that it was at all times affiliated with the Federation. I rejected the stipulation as factually

*Continued*

Tomasso's testimony concerning the theft of the car containing the two boxes of subpoenaed documents strains credulity. The alleged theft occurred two months after Judge Luongo issued his Order enforcing the Employer's subpoenas. Notwithstanding the obvious importance of the documents and the Court enforced obligation to produce the documents at the representation hearing, Tomasso treated the subpoenaed materials in a most cavalier and reckless manner. First, no satisfactory explanation was offered as to why the boxes were taken to Connecticut as they were to have been reviewed on February 9 in New York by the Petitioner's counsel prior to their production at the hearing in Philadelphia. Second, Tomasso took them to Connecticut in a car which was in need of service. In Connecticut, he left the documents in the trunk of the car, overnight in a parking lot, even though his wife had driven to New Haven that same day in another car to which the boxes could have been transferred for safekeeping. The leased car was then allegedly stolen, and discovered a few days later in Rhode Island following receipt of a "tip" from an unnamed source. The ignition was not tampered with, and the ignition and trunk keys were found under the floor mat where Tomasso had left them. Of course, the boxes containing the subpoenaed materials were gone, although it is difficult to construct some plausible explanation for the theft or destruction of these documentary records which could have been of no value to the person or persons who had taken the car. Tomasso's testimony that the trunk area of the car was scratched, dented and pried up is contradicted by photographs evidencing no damage to the trunk and by the police reports indicating no damage to the trunk. Finally, on September 23, Tomasso inexplicably failed to report the theft of the documents to the Hearing Officer, but merely told him that he was unwilling to produce them at the hearing in the absence of his counsel. Similarly, Tomasso failed to report the theft of the subpoenaed materials to the police.

With respect to this attempt to explain or excuse the Petitioner's and the Federation's failure to produce the subpoenaed materials, it is interesting to note that, in the criminal proceedings referred to above, Federation Trustee Jaffe was convicted of fraud in staging the "theft" of another leased car, which "theft" he falsely reported to the police. At the hearing in *Resorts International, supra*, Anthony Miceli explained his inability to produce certain original documents by claiming that his car had been stolen. In light of the record evidence discussed above, I find that Tomasso's account of how the subpoenaed materials disappeared is simply unworthy of belief.<sup>10</sup> Moreover, although, given the opportunity to

produce duplicate or substitute records which might be available from alternate sources, none of the documents which were purportedly stolen were produced in response to the subpoena. The only documents produced by the Petitioner and the Federation were the constitution and by-laws of the Federation, Local 1 and the Allied Union, LM-2 reports for the Federation and the Allied Union, and collective bargaining agreements of the Federation and the Allied Union.

Section 101.18(c) of the Board's Rules and Regulations provides, *inter alia*: "The petition may . . . be dismissed in the discretion of the regional director if the petitioner fails to make available necessary facts which are in its possession." In view of the professed lack of knowledge of Miceli and Tomasso as to the affairs of the Petitioner and the Federation, the documents subpoenaed by the Employer, such as financial reports and statements, minutes of meetings, records showing the identity of Union officers and employees and their salaries and expenses reimbursements, loan documents and rental agreements, and unquestionably relevant in this case to the issue of whether the Petitioner and the Federation are labor organizations within the meaning of Section 2(5) of the Act. See *Douglas Oil, supra*, and *McDonald's, supra*. The failure to produce such documents at any time during the course of the hearing, even after the car theft when the Petitioner's counsel stated that copies of some of the documents had been obtained, clearly shows the Petitioner's unwillingness to cooperate in the investigation of its petition and its withholding of necessary evidence in its possession. Vice-President Tomasso's refusal on May 29, 1982, to accept service of a subpoena and President Miceli's failure to appear at the hearing until March 3, 1982, subsequent to the Court enforcement of the subpoenas, despite having been served with a subpoena requiring his appearance on September 22, 1981, further shows the Petitioner's contempt for the Board and its processes. According to the Petitioner's counsel, Daniel Cunningham and Herman Jaffe did not honor their subpoenas upon the advice of their criminal attorneys. However, they were not privileged to refuse to comply with Judge Luongo's Order to appear, although they may have asserted their Fifth Amendment privilege against self-incrimination of the witness stand.

Based on the record evidence set forth in this Decision and the entire record in this proceeding, and applying the Board precedents referred to above, I find that the Petitioner and its parent organization, the Federation, are not organizations dedicated to the interests of the employees as a bona fide collective-bargaining representative, that they are not organizations in which employees participate to any significant extent in the governance and administration of the organization, and that they are not labor organizations within the meaning of Section 2(5) of the Act. Therefore, they are not entitled to the benefits of the Board's representation case processes to gain certification as the exclusive collective-bargaining representative of the employees who are the subject of this petition. In reaching this conclusion, I have not ignored or overlooked the prior decisions in *Grete Bay Hotel & Casino, Inc., supra*, *Resorts International, Inc.*

inaccurate, but concluded that, although the disaffiliation may have been merely an attempt to mislead the Board, it did not warrant dismissal of the petition. However, when viewed in the context of this record, I find this incident to be further evidence of the Petitioner's lack of candor in Board proceedings, and of its deliberate efforts to mislead the Board with respect to the true nature of the Petitioner and the Federation.

<sup>10</sup> In *Douglas Oil, supra*, the Board found, at fn. 7, "While the Board does not normally make credibility resolutions in nonadversary proceedings, the Board has, where no other result could be justified, found testimony in such proceedings incredible. *Supreme, Victory and Deluxe Cab Companies*, 160 NLRB 140, 145."

*supra*, and *GNAC, Inc., d/b/a Golden Nugget Hotel and Casino, supra*, in which I found that the Petitioner and the Federation were labor organizations within the meaning of Section 2(5) of the Act, and *Bally's Park Place, Inc.*, 257 NLRB 777, in which the Board found that the Petitioner was a labor organization within the meaning of the Act. However, those cases were decided on the basis of the records in those proceedings and the records in the instant case presents a substantially different picture. Whatever else the Petitioner and the Federation may be, it cannot be said based on the record herein that they are labor organizations within the meaning of Section 2(5) of the Act. While Congress chose a broad definition for the term and the Board and the Courts, in keeping with the Congressional intent, have given the term a liberal interpretation,<sup>11</sup> surely Congress did not intend that the Board should allow its processes to be used by an organization such as the ones portrayed by this record to gain exclusive representative status for

<sup>11</sup> See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *NLRB v. Kenametal, Inc.*, 182 F.2d 817 (3d Cir. 1950), affirming 80 NLRB 1481; *Steiner-Liff Textile Products Co.*, 259 NLRB 1064; *Plumbers Local 388 (Charles Featherly Construction Co.)*, 252 NLRB 452; *Roytype, Division of Litton Business Systems, Inc.*, 199 NLRB 354; *Gino Morena d/b/a Gino Morena Enterprises*, 181 NLRB 808; *Grand Lodge International Association of Machinists and Aerospace Workers, AFL-CIO*, 159 NLRB 137.

purposes abhorrent to the Act. Therefore, I shall dismiss the petition.<sup>12</sup>

#### ORDER<sup>13</sup>

It is hereby ordered that the petition filed herein, be, and it hereby is, dismissed.

<sup>12</sup> In view of the dismissal of the petition herein, it is unnecessary to determine the labor organization status of the Intervenor, which is contested by the Employer, or the disputed eligibility of leading security officers.

As stated earlier in this Decision, the Board is currently reviewing the Decisions and Directions of Elections in *Greave Bay Hotel & Casino, Inc.*, Case 4-RC-14377, *GNAC, Inc., d/b/a Golden Nugget Hotel and Casino*, Case 4-RC-14522, and *Resorts International, Inc.*, Case 4-RC-14588. In view of the record in this proceeding and the instant Decision in which I have found that the Petitioner and the Federation are not labor organizations within the meaning of the Act, I recommend that the Decisions in those cases be reviewed in light of this record, and that the petitions in those cases be dismissed. I also note that there is a Motion for Reconsideration pending before the Board in *Burns International Security Services, Inc.*, 256 NLRB 959, in which the Board certified Local 1 as the collective-bargaining representative for a unit of security officers at the Peach Bottom Nuclear Power Plant.

<sup>13</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington By December 6, 1982.